83-311

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

ABRAHAM STRASSNER,

PETITIONER,

v.

SELMA ROTHSTEIN STRASSNER,

RESPONDENT.

PETITION FOR WRIT OF CERTORARI TO
THE NEW YORK STATE APPELLATE DIVISION

ABRAHAM STRASSNER
Petitioner Pro Se
2316 National Drive
Brooklyn, New York 11234
Telephone: (212) CH1-8713

QUESTION PRESENTED FOR REVIEW

1. Whether a foreign divorce decree where petitioner's appearance was obtained by fraud violates petitioner's constitutional rights to due process?

TABLE OF CONTENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

ABRAHAM STRASSNER,

PETITIONER,

v.

SELMA ROTHSETIN STRASSNER,

RESPONDENT.

PETITION FOR WRITE OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION

The petitioner, Abraham Strassner, respectively prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of

New York, Appellate Division entered on the 22nd day of February, 1983.

OPINION BELOW

The Appellate Division entered its decision refusing to overturn the judgment in favor of the respondent on February 22, 1983. A copy of the decision is annexed hereto as Appendix A.

JURISDICTION

The jurisdiction of this court is invoked under

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

> No person shall be deprived of property... without due process of law....

STATEMENT OF THE CASE

On February 22, 1983 the Appellate Division refused to overturn a judgment granting partition of real property

held by the petitioner and respondent, as husband and wife. The Court below having granted partition on the basis of a foreign divorce decree which the petitioner claims was obtained by fraud. On June 16, 1983 the New York State Court of Appeals denied a motion for a leave to appeal. A copy of that order is attached as Appendix B.

REASON FOR GRANTING THE WRIT

Petitioner and Respondent were married on April 4, 1949 and had two children of the marriage. In 1963 the parties purchased, as husband and wife, the premises known as 2316 National Drive, Brooklyn, New York. It is this parcel of real property which is the subject matter of the action below for partition. The matter was brought on by the Respondent by Order to Show Cause and the Petitioner submitted an

Affirmation in Opposition. The matter was referred by Duberstein, J. to Special Referee Joseph P. Imperato to hear and determine. On December 11, 1981 a hearing was held before Special Referee Imperato, and on June 10, 1982, Referee Imperato rendered his decision, and an order was entered pursuant to that decision on July 14, 1982. Judge Imperato's decision was unanimously affirmed by the Appellate Division, Second Department on February 22, 1983.

Respondent contendes that in August of 1970 she obtained a bilateral Mexican decree of divorce, thereby severing the martial ties between Respondent and Petitioner. Petitioner contends that no knowledgeable consent to appear in the courts of Mexico was ever procured from him which would have the Mexican action bilateral in nature and further, would

have signaled his acquiescence that the divorce matter be litigated in Mexico.

After August of 1970, it is incontrovertible that the Respondent Wife herein resided with the Petitioner Husband and for each and every year through 1977, filed United States income tax returns jointly with the Petitioner, as husband and wife. It is further uncontroverted that in October of 1970, less than two months after Respondent claims she obtained a bilateral Mexican divorce, she, along with Petitioner, renegotiated the mortgage on the present parcel of real estate with the bank then holding the mortgage. Respondent signed the mortgage, bond and note as the wife of the Petitioner herein.

Thereafter and within a year after Respondent's claimed divorce, Respondent and Petitioner purchased property in the

State of Pennsylvania for use as a summer home. Said property was purchased in the name of the parties as husband and wife and Respondent signed the bond and mortgage note under oath in the State of Pennsylvania as the wife of the Petitioner.

Additionally, Respondent continued to maintain her voter registration as married to the Petitioner herein. Respondent obtained and kept for herself medical benefits under Petitioner's health insurance policy and held herself out as Petitioner's wife. Respondent could not have collected such benefits if she were not Petitioner's wife, and was aware of that restriction at the time she applied for said benefits.

Respondent and Petitioner cohabited and, in addition to such cohabitation,

they held a twenty-fifth wedding anniversary party in the year 1974, which party was attended by, in addition to many others, Respondent's brother, mother and father, all of whom Respondent claims in her testimony knew she had been divorced from the Appellant four years earlier. Respondent continued to receive congratulatory and wedding anniversary cards from her mother and brother as late as 1977, although Respondent claims these members of her family were privy to the fact that she had obtained a divorce in August of 1970. The above facts are uncontroverted and were directly admitted by the Respondent in the hearing below.

Petitioner claims that no knowledgeable consent was ever obtained from him acquiescing in the Mexican divorce

and that in fact the parties are still married and that, therefore, no action in partition may be had.

CONCLUSION

For the foregoing reasons, Petitioner Abraham Strassner respectfully requests that a write of certiorari issue to review the judgment of the Supreme Court of the State of New York, Appellate Division.

Dated: August 24, 1983

Respectfully Submitted,

ABRAHAM STRASSNER
Petitioner Pro Se
2316 National Drive
Brooklyn, New York 11234
Telephone: (212) CH1-8713

APPENDIX

POINT I

BURDEN OF PROOF

The burden of proof as to the validity of the instrument in evidence purporting to be a consent to appearance in Mexico by the Petitioner in the instant matrimonial is on the Respondent herein. As the court said in Kantrowitz v. Kantrowitz, 21 A.D.2d 654, 249 N.Y.S. 2d 723, in referring to a consent to appear in a Mexican court executed by a party challenging that consent:

> This instrument was to be used to [his] advantage for the purpose of severing the marital ties, so the burden was upon him to show that the petitioner executed the same freely and deliberately with a full understanding of [her] rights.

In the instant case at bar, the Respondent was instrumental in procuring the Petitioner's signature on a document which by his own testimony he did not

read. This occurred as a result of a conversation settling a New York divorce action between the parties in which it was agreed to discontinue the New York matrimonial action and Petitioner contends to return his wife to him, as his wife. Respondent contends that the settlement contained a provision by which she would be divorced in Mexico but would continue to live with the Petitioner as husband and wife, holding herself out to all the world as Petitioner's wife while in fact she was divorced. The burden of proof in such unusual circumstances in connection with the procuring of any alleged knowing consent by Petitioner to a Mexican decree must be borne by the party alleging such agreement.

Petitioner contends that he settled the matrimonial case in New York and

that in consequence of said settlement and discontinuance his wife agreed to return to him as his wife. Every fact occurring thereafter was intended to reinforce that conclusion.

POINT II

EXTRINSIC FRAUD HAS BEEN DEFINED AS INCLUDING FRAUD COLLATERAL TO THE QUESTION EXAMINED AND DETERMINED IN THE ACTION.

The Court in Tamini v. Tamini, 38 A.D.2d 197, 328 N.Y.S.2d 477, defined the term extrinsic fraud as stated above and went on to say:

> fraud practiced in obtaining the judgment which may have prevented the defendant from having an adversary trial of the issue or preventing the defendant from presenting fully and fairly his side of the cause ... Included in such definition are false representations ... false promises of compromise.

It is not merely that the Petitioner herein has been denied an

opportunity for a defense, it is that the Petitioner knew of no defense to the Mexican action since the existence of such a defense was fraudulently concealed from him by Respondent's actions prior to and after the alleged Mexican divorce. See Feinberg v. Feinberg, 96 Misc.2d 443, 409 N.Y.S.2d 365. For language directly on point, see Prime v. Hinton, 244 App. Div. 181, 279 N.Y.S. 37 in which the Court stated:

> ... The appellant erroneously assumes that the defense herein is based solely upon the deprivation of the opportunity to interpose a known defense in the Nevada action. The fact of the matter is, the defendant knew of no defense to the Nevada action. The existence of such defense was fraudulently concealed from the defendant.

See also in this regard, Gardner v. Van Alstyne, 22 App. Div. 579.

POINT III

THE DOCUMENTS SIGNED BY THE RESPONDENT HEREIN AS THE WIFE OF THE PETITIONER AFTER THE ALLEGED DIVORCE ARE SUFFICIENTLY SIGNIFICANT TO ESTABLISH FRAUD

In the case at bar, the Respondent admits that she signed documents under oath as the wife of the Petitioner including bonds, notes and mortgages in two states. That she signed and filed income tax returns as the Petitioner's wife for seven (7) years. That she used Petitioner's health insurance policy signing as Petitioner's wife. That she never changed her voter's registration certificate to indicate her single status. In a case analogous to this one, the Court found that the issue centered on credibility and said as follows:

> She asserted that she never considered their marriage

> dissolved, nevertheless, the election registry rolls of the Board of Elections indicate her civil status when she registered to vote in 1952 as single, in 1955 as divorced, and in 1956 as single, and her withholding tax statements of 1952 and 1955 described her as single.
>
> In the Matter of the Claim of Sadie Lefkowitz, etc. v. Herman Silverstein, et al., 11 A.D.2d 841, 203 N.Y.S.2d 118.

In the instant case, the factors are exactly reversed. Here Respondent never changed her voter registration to show that she was single, continued to file joint tax returns as the wife of the Petitioner, sign documents under oath in two states as the wife of the Petitioner, and continued to use Petitioner's health insurance policy and secure benefits for herself as his wife. The issue of credibility is settled. Any admission by the Respondent that she believed herself to be

divorced in light of these documents of moment and of record is supercilious and patently absurd.

Further, her contention that her family knew her to be divorced is beyond credibility when in fact her family participated in 1974 in her Twenty-Fifth wedding anniversary celebration and continued to send her anniversary congratulations through 1977. It is interesting to note that no member of her family was called in rebuttal although her brother was present in court.

POINT IV

AN APPEARANCE IN A FOREIGN COURT TO BE EFFECTIVE MUST BE KNOWINGLY CONSENTED TO

In the instant case, Petitioner, after a long conversation arranged through mutual friends which resulted in a settlement of the New York divorce action between the parties, believed that his wife was returning to him. Much is made by the Respondent's counsel of the signed document purporting to contain his agreement to be represented in the Mexican courts. Petitioner has testified that he signed a document at the home of one Kenneth Shapiro whom the court records indicate was not his attorney but was merely associated with the Petitioner's attorney's firm. All of this pales to insignificance when confronted with the

fact that Petitioner believed he was signing a document which would bring his wife back to him as his wife and never consented to her divorcing him in any court. Had the Petitioner agreed to the farce urged on the court by the Respondent, to wit: a divorce followed by the parties living together and holding themselves out as married to all the world, they could have accomplished that in New York by withdrawing Petitioner's answer and allowing Respondent to obtain an uncontested New York divorce without the necessity of going to Mexico. Respondent knew that Petitioner would not agree to such a travesty and so Respondent connived to go to Mexico where only she would be present and know what occurred and where the Petitioner would never know of the divorce. See in this regard, Kantrowitz

v. Kantrowitz, supra, Greenfield v. Greenfield, 123 N.Y.S.2d 19. With both sides represented by counsel, had they intended what Respondent claims, would they not have worked out an agreement setting forth the respective property rights as well as visitation for the then unemancipated children of this marriage? Of course they would have. Respondent knowing of her deceitful conduct, left these matters for a future date, hoping that by the lapse of time the evidence of her fraud would remain somnambulant. Respondent testified that her life with Petitioner was hellish, that she was physically assaulted by him and yet, after instituting a matrimonial action in New York which was discontinued and obtaining a Mexican divorce, she returns to live with the Petitioner as man and wife in

every way for seven (7) years. To believe that this decree of divorce was obtained in a non-fraudulent manner is pusilanimous and contrary to the facts in evidence.

APPENDIX A

VITO J. TITONE, J.P.
GUY J. MANGANO
DAVID T. GIBBONS
MOSSES M. WEINSTEIN, JJ.

A - January 31, 1983

Selma Rothstein Strassner, respondent, v Abraham Strassner, appellant.

Zerin & Cooper, New York, N.Y. (Jay M. Zerin and Neil Rothfeld of counsel), for appellant.

Burton G. Rudnick, Brooklyn, N.Y., for respondent.

Order of the Supreme Court, Kings County (IMPERATO, R.), entered July 14, 1982, affirmed, with $50 costs and disbursements. No opinion.

TITONE, J.P., MANGANO, GIBBONS AND WEINSTEIN, JJ., CONCUR.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 22, 1983.

HON. VITO J. TITONE, Justice Presiding,
HON. GUY J. MANGANO,)
HON. DAVID T. GIBBONS,) Associate Justices
HON. MOSES M. WEINSTEIN.)

Selma Rothstein Strassner,
Respondent,
v.
Abraham Strassner,
Appellant.

Order on Appeal from Order

In the above entitled cause, the above named Abraham Strassner, defendant, having appealed to this court from an order of the Supreme Court, Kings County, entered July 14, 1982;

and the said appeal having been argued by Jay M. Zerin, Esq., of counsel for the appellant, and argued by Burton G. Rudnick, Esq., of counsel for the respondent, and due deliberation having been had thereon;

and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed, with $50 costs and disbursements.

Enter:

/s/ Irving N. Selkin

Clerk of the Appellate Division

APPENDIX B

2 Mo. No. 574
Selma Rothstein Strassner,
Respondent,
vs.
Abraham Strassner,
Appellant.

Motion for leave to appeal denied.

DECISION COURT OF APPEALS JUN 16, 1983.

APPENDIX C

MEMORANDUM

SUPREME COURT KINGS COUNTY

(SPECIAL TERM PART V-A)
By
JOSEPH P. IMPERATO, Special Referee
Dated June 10, 1982

SELMA ROTHSTEIN STRASSNER

vs. Index #9662/70

ABRAHAM STRASSNER

This application seeking a partition and sale of certain real property was referred to me to hear and determine by Judge Duberstein.

The hearing was held on December 11, 1981 and the following are my findings of fact and conclusions of law.

The facts elicited at the hearing evidence that the parties were married in 1949. In 1963 they bought a parcel of real property as tenants by the entirety. On August 4, 1970 the defendant-husband signed a power-of-attorney and thereafter

plaintiff-wife obtained a Mexican divorce. Subsequent to the parties obtaining the divorce they, by mutual agreement, commenced living together anew in the home now sought to be partitioned. The testimony indicates that the parties held themselves out to be husband and wife, the Mexican divorce notwithstanding.

The defendant-husband, while conceding his signature on the power-of-attorney (see hearing minutes, p. 57), nevertheless contends that he did not know that he signed a Power-of-Attorney and that the divorce was therefore fraudulently obtained. The court finds defendant's testimony incredible, especially in light of his education and investigative background.

This court, in consequence of a valid Mexican divorce, such as here, is required to give full faith and credit to same. Upon the dissolution of the marriage, the

tenancy by the entirety became a tenancy in common. No impediment appearing therefor, the application seeking a partition and sale of the marital abode is granted to the extent of appointing an appraiser to evaluate the property for purposes of sale. Once the evaluation has been made, an application may be made to the court with respect to the disposition of said property. The court shall appoint an independent appraiser and payment of his services shall be borne equally by both parties.

Settle order.

JOSEPH P. IMPERATO
Special Referee

No. 83-311

IN THE

Supreme Court of the United States

October Term, 1983

ABRAHAM STRASSNER,

Petitioner,

v.

SELMA ROTHSTEIN STRASSNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

SELMA ROTHSTEIN STRASSNER
Respondent Pro Se
200 Central Park South
New York, New York 10019
(212) 246-0524

QUESTION

THE QUESTION PRESENTED TO THIS LEARNED COURT, IS ERROR, IN THAT IT HAS BEEN ESTABLISHED FACTUALLY, THAT THERE WAS NO FRAUD ON THE PART OF THE RESPONDENT HEREIN.

JURISDICTION

THE CONSTITUTIONAL PROVISION INVOLVED:

> "NO PERSON SHALL BE DEPRIVED OF PROPERTY . . . . WITHOUT DUE PROCESS OF LAW."

IS APPLICABLE NOT TO THE PETITIONER HEREIN, BUT TO THE RESPONDENT.

THE PARTIES OWN REALTY. THE RESPONDENT SOUGHT HER MOIETY. THE PETITIONER, LIVING THEREIN, RENT FREE (TENANT'S RENT), HAS FOR YEARS, AND STILL DOES, SEEK TO DEPRIVE THE RESPONDENT OF HER SHARE OF THE JOINTLY OWNED PREMISES.

THERE IS NO DEPRIVATION OF PROPERTY . . . . WITHOUT DUE PROCESS OF LAW . . . ." TO THE PETITIONER HEREIN.

TABLE OF CONTENTS

No. 83-311

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

ABRAHAM STRASSNER,

PETITIONER,

V.

SELMA ROTHSTEIN STRASSNER,

RESPONDENT.

ANSWER TO WRIT OF CERTIORARI

NOW, COMES THE RESPONDENT, SELMA ROTHSTEIN STRASSNER, AND SUBMITS HEREIN HER SWORN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES.

The respondent herein, respectfully prays that the application of petitioner to review a Judgment of the Supreme Court, the Appellate Division of the Supreme Court and the Court of Appeals, be denied.

The petitioner improperly invokes a constitutional provision - Amendment V, viz.:

> "No person shall be deprived of property . . . without due process of law . . . ."

It is the petitioner, who is endeavoring to misuse the Fifth Amendment to deprive the respondent, former wife, of her moiety in a former marital residence.

The petitioner attempted to vacate a bilateral foreign divorce (Mexican), by stating he signed a Special Power of Attorney in the office of his attorney, which attorney acknowledged his signature, wherein he consented to appear in the Mexican proceedings

AND IMPOWERED AN ATTORNEY IN MEXICO TO REPRESENT HIM.

THAT A PROCEEDING FOR AN ORDER OF PARTITION AND FOR THE SALE OF PREMISES LOCATED IN BROOKLYN, NEW YORK, WAS INITIATED ON THE GROUND THAT THE PREMISES ARE HELD BY THE PARTIES AS TENANTS IN COMMON, AS A RESULT OF A BILATERAL DIVORCE OBTAINED BY THE RESPONDENT IN THE CIRCUIT COURT OF BRAVOS COUNTY, STATE OF CHIHUAHUA, COUNTRY OF MEXICO.

HISTORY

PETITIONER AND RESPONDENT INTERMARRIED APRIL 6, 1949, AND HAVE TWO CHILDREN, BOTH LONG AGO EMANCIPATED.

THAT ON JANUARY 31, 1970, RESPONDENT INITIATED AN ACTION FOR A SEPARATION IN THE SUPREME COURT, KINGS COUNTY, ON THE GROUND OF CRUEL AND INHUMAN TREATMENT WHICH INCLUDED NUMEROUS ACTS OF ASSAULTS AND BATTERIES.

That the petitioner interposed an answer to respondent's complaint and the petitioner did appear by an attorney whose name appears thereon, thusly:

"Yours etc.

KENNETH L. SHAPIRO
c/o Spector, Meisner, Greenspun,
Berman & Fink
16 Court Street
Brooklyn, New York 11201"

That the pink back cover of the Answer to respondent's complaint, contained the same typed in name, KENNETH L. SHAPIRO over printed Spector, Meisner, Greenspun, Berman & Fink.

That after the matter became at issue, the petitioner continued to implore respondent for a reconciliation.

That in July 1970, the parties met at a place called Market Diner, New York, New York.

That an agreement was reached, thusly:

(1) The respondent would return to the marital premises, but only if she was divorced.

(2) That this would permit her to walk away from the petitioner in the event she was assaulted or abused again.

(3) That the attorneys for the respective parties entered into a stipulation discontinuing the New York separation action. The attorneys being, Burton G. Rudnick, Esq., for respondent, and Kenneth L. Shapiro, Esq., for petitioner.

(4) That the petitioner executed an instrument called a Special Power of Attorney, This power also contained a notice of appearance and consent to appear in the jurisdiction. That the instrument was sworn to and was acknowledged by the above attorney, Kenneth L. Shapiro, Esq., on August 4, 1970.

That the respondent appeared in person and did comply with the rules and regulations of the State of Chihuahua. The respondent obtained a judgment of divorce on the 22nd day

of August, 1970.

That at the divorce proceedings, the petitioner was represented by an attorney of his own selection and choice, one Carlos Munoz.

The respondent returned to Brooklyn, New York, but did not reconcile. The respondent waited for an exemplified copy of the Judgment, duly translated by the American Counsel, to arrive.

That several weeks thereafter, upon receipt of the Mexican Judgment, the respondent returned to the marital premises.

That the respondent left the premises at the end of 1976 or 1977, because of the cruel and inhuman treatment administered by the petitioner.

That the respondent made demand upon the petitioner to sell the jointly owned house, and divide the proceeds, but that the petitioner refused so to do.

THE RESPONDENT SUED TO PARTITION THE PREMISES. THE COURT DETERMINED THAT THE DIVORCE WAS BILATERAL IN NATURE AND THAT THE TENANCY WAS CONVERTED TO TENANCY IN COMMON. THE COURT DIRECTED THAT THE PROPERTY IS PARTITIONED AND SHOULD BE SOLD AND DIVIDED. THIS DECISION AND ORDER HAS BEEN SUSTAINED FROM SUPREME COURT THROUGH THE APPELLATE DIVISION AND COURT OF APPEALS OF NEW YORK STATE.

PETITIONER'S CONTENTION

THE PETITIONER HEREIN SETS FORTH HIS FULL ERRONEOUS CONTENTION:

> "PETITIONER CONTENDS THAT NO KNOWLEDGEABLE CONSENT TO APPEAR IN THE COURTS OF MEXICO WAS EVER PROCURED FROM HIM WHICH WOULD MAKE THE MEXICAN ACTION BILATERAL IN NATURE AND WOULD HAVE SIGNALED HIS ACQUIESCENCE THAT THE DIVORCE MATTER BE LITIGATED IN MEXICO."

There was no actual legal or equitable defense submitted to respondent's New York action by this petitioner. There is no claim by petitioner of intrinsic fraud, duress or other fault. He advanced no defense that could vitiate the bilateral divorce.

On the contrary, it was difficult to ascertain by his testimony and pleadings, if petitioner's claim of fraud was directed to respondent, the Court of Mexico, or his own attorney.

The petitioner admitted in his testimony and pleadings:

(1) That he signed an instrument called a Special Power of Attorney to have Carlos Munoz, appointed his attorney in Mexico.

(2) The petitioner admitted this was signed - the power at the home of his attorney, Kenneth L. Shapiro.

(3) The petitioner admitted that the lawyer was a notary.

(4) That the signature on the Power of Attorney and consent to appear in the Mexican Court, was his. However, he claimed that he did not know what he was signing, that Mr. Shapiro was not his attorney, but Mr. Berman, of the same law firm, was his attorney.

The petitioner acknowledged that he attended three colleges, Fordham, Brooklyn and New York. That he was in the District Attorney's office for 2 years as a rackets investigator; that he was on the executive staff of the Comptroller of the City of New York, and that he signed the instrument to keep respondent.

The following question and answer was given:

Q. . . . . Now, however, with this background of an education and with this background of public service, you went to the

HOME OF A MAN AND YOU SIGNED A PAPER AND YOU DID NOT KNOW WHAT YOU WERE SIGNING, IS THAT WHAT YOU ARE TELLING US?

A. <u>BECAUSE I WANTED MY WIFE</u>.

THAT THE PETITIONER ULTIMATELY STIPULATED THAT IF MR. SHAPIRO WAS TO TESTIFY, HE WOULD STATE HE WAS AN ATTORNEY AND THAT HE DID TAKE THE SIGNATURE OF THE PETITIONER ON AUGUST 4, 1970.

THUS, HAVING PRESENTED ALL THE ABOVE TO THE COURT, IT WAS FOUND THAT RESPONDENT WAS DIVORCED.

THAT A PARTITION AND SALE WAS ORDERED AND A DIRECTION THAT EACH RECEIVE A ONE-HALF SHARE.

AN APPRAISER WAS APPOINTED.

THAT RESPONDENT SHALL PROCEED FURTHER, REQUEST THAT THE HOUSE BE SOLD AND THE NET PROCEEDS DIVIDED.

THE PETITIONER IS RESIDING RENT FREE, BECAUSE HE HAS A TENANT PAYING PRACTICALLY ALL RENT - UTILITIES.

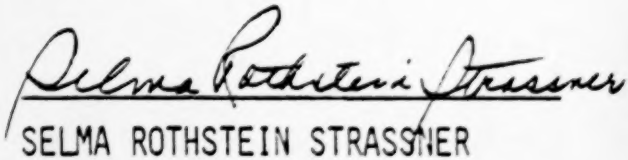
THE PETITIONER DOES NOT WANT TO LOSE HIS FREE RENT, SO INVOKES THE FIFTH AMENDMENT HEREIN.

HE USES SAME AS A CLUB ON RESPONDENT TO DETER THE PROPER CONCLUSION.

RESPONDENT REQUESTS THE PETITION BE DISMISSED.

DATED: OCTOBER 4, 1983

RESPECTFULLY SUBMITTED,



SELMA ROTHSTEIN STRASSNER
RESPONDENT-PRO-SE
200 CENTRAL PARK SOUTH
NEW YORK, NEW YORK
TELEPHONE: (212) 246-0524

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

ON THE 4TH DAY OF OCTOBER, 1983, BEFORE ME PERSONALLY CAME, SELMA ROTHSTEIN STRASSNER, TO ME KNOWN, AND KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED IN, AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND DULY ACKNOWLEDGED TO ME THAT SHE EXECUTED THE SAME.

HELEN M. SARUBBI
Notary Public, State of New York
No. 24-4766666
Qualified in Kings County
Commission Expires March 30, 1984

APPENDIX

POINT I

BURDEN OF PROOF

THE PETITIONER QUOTES BURDEN OF PROOF AND ATTEMPTS TO PLACE THE ONUS ON RESPONDENT, WHEN IT IS HE WHO USES SAME AS A SWORD.

NEW YORK JURISPRUDENCE VOL. 14, PAGE 274:

> ONE WHO ALLEGES FRAUD AS A BASIS OF A DEFENSE MUST ESTABLISH IT BY THE REQUISITE QUANTUM OF PROOF IN ORDER TO PREVAIL IN THE ACTION. SINCE IN THE ABSENCE OF PARTICULAR CIRCUMSTANCES, THE PRESUMPTION IS IN FAVOR OF GOOD FAITH, INNOCENCE AND HONESTY AND AGAINST FRAUD, THE PARTY, WHO ALLEGES FRAUD ORDINARILY MUST CARRY THE BURDEN OF PRODUCING EVIDENCE TO PROVE IT.
>
> FRAUD IS A FACT THE EXISTANCE OF WHICH IS ASCERTAINED LIKE OTHER FACTS BY COM-

PARING AND WEIGHING THE EVIDENCE (BENNETT'S EST. 205 NYS 2D 50). IT IS FUNDAMENTAL THAT IN THE ABSENCE OF SPECIAL CIRCUMSTANCES FRAUD WILL NOT BE PRESUMED, ASSUMED OR INFERRED BUT MUST BE PROVED BY THE PARTY ALLEGING IT AND WHERE A JUDGMENT IS BASED UPON A FINDING OF FRAUD, THERE MUST BE EVIDENCE OF FRAUD WHICH JUSTIFIES THE FINDINGS IN ORDER TO SUSTAIN THE JUDGMENT (WAGGONER V. JAGEACH 241 AD 324, 272 NYS 182, BARR V. SOFRAUSKI, 130 AD 783, 115 NYS 533). WHERE THE EVIDENCE RELIED UPON TO PROVE FRAUD IS EQUALLY CONSISTENT WITH INNOCENCE THAT CONSTRUCTION MUST BE PLACED UPON IT, WHICH WILL EXONERATE THE PARTY ACCUSED, 3 CAINES 182. THUS, IF THERE IS PROOF OF AN HONEST INTENT THE PROOF OF FRAUD IS WANTING. SPUR V. HALL, 46 AD 451, 61 NYS 854 AFF 279 NY 634.

AS TO POINT I

THE PETITIONER CONTENDS THAT THE BURDEN OF PROOF AS TO THE VALIDITY OF THE INSTRUMENT IN EVIDENCE PURPORTING TO BE A POWER OF ATTORNEY AND CONSENT IN A MEXICAN DIVORCE, IS ON THE RESPONDENT HEREIN.

THE PETITIONER SUBMITS THE CITATION KANTROWITZ V. KANTROWITZ, 21 AD 2D 654, 249 NYS 2D 723.

IT IS THE ARGUMENT HEREIN, THAT THE PETITIONER HAS A MISCONCEPTION OF THE NATURE OF HIS CITATION.

IT IS THE PETITIONER WHO WISHES THIS INSTRUMENT, CONSENT (POWER OF ATTORNEY) TO BE USED TO HIS ADVANTAGE. THE PETITIONER'S EFFORT IS AN ATTEMPT TO DENY THAT THE PARTIES ARE DIVORCED. THE PETITIONER ATTEMPTS TO AVOID PARTITION AND SALE, SO THAT HE MAY BENEFIT IN THE TENANT'S RENT AND WHICH SHALL GIVE HIM FREE RENTAL. HE ALSO TRIES TO VOID RESPONDENT'S MOIETY THEREIN.

Petitioner admits signing the Power of Attorney used in the divorce action in Mexico.

The petitioner stipulated that the party who acknowledged his signature, was a lawyer.

The petitioner stipulated he knew the notary ten years before he signed the Power and Consent.

The petitioner said he signed said Power and Consent because <u>he wanted his wife</u>, and he signed said instrument after a meeting with her at a restaurant.

Although he stated he knew not what he signed, his credibility was overtaxed, in that besides having an education up to college level, he was an investigator for the Rackets Bureau of the District Attorney's office for 2 years, and an executive in the Comptroller's office for five years, together with being a salesman for 5 years.

ON THE SURFACE, THIS TYPE OF EDUCATION AND EMPLOYMENT WOULD DENY IGNORANCE, NEGLIGENCE, FRAUD, DURESS OR MISTRUST.

THE BURDEN OF PROOF IS ON THE PETITIONER IN ANY EVENT. HE HAS NOT SUSTAINED SAME.

AS TO POINT II

SUDDENLY HEREIN, THIS PETITIONER REVERTS TO THE DEFENSE OF FRAUD.

THE DIVORCE HEREIN WAS BI-LATERAL.

THE DEFENSE PROMULGATED BY THE PETITIONER THAT HE KNEW OF NO DIVORCE AND/OR PRIOR CONVERSATIONS WITH RESPECT THERETO, IS NOT CREDIBLE. (SEE HIS ADMISSIONS SUPRA).

HE ADMITS SIGNING THE POWER OF ATTORNEY, BEFORE A LAWYER NOTARY, WHICH LAWYER REPRESENTED HIM IN THE NEW YORK MATRIMONIAL ACTION, AND WHO, AS HIS LAWYER, SIGNED THE STIPULATION OF DISCONTINUANCE. HOWEVER, WHEN PRESSED, HE

ADMITTED HE SIGNED A PAPER BECAUSE HE WANTED HIS WIFE.

THERE IS NO DEFENSE IN THE INSTANT CAUSE. THE MEXICAN DIVORCE IS VALID. THIS PETITIONER CONSENTED TO THE DIVORCE AND EMPOWERED RESPONDENT TO OBTAIN THIS BI-LATERAL DECREE.

THAT THIS SITUATION IS FACTUAL IN NATURE. THERE WAS NO FRAUD.

IN HUNT V. HALL, 72 NY 217 AFF. 139 AD 120, 123 NYS 1056, THE COURT STATED:

> "FRAUD MUST BE ACTIONABLE AND THE ELEMENTS OF ACTUAL FRAUD SUCH AS FALSE REPRESENTATION WHICH WAS DESIGNED TO MISLEAD THE OPPOSITE PARTY, SCIENTER RELIANCE UPON THE MISREPRESENTATION AND RESULTANT DAMAGE TO THE DEFRAUDED PARTY MUST ALL APPEAR."

THE PETITIONER WAS REPRESENTED BY COUNSEL AND SHOULD NOT NOW BE PERMITTED TO PLEAD IGNORANCE, FRAUD OR DURESS. CHRISTIAN V.

CHRISTIAN, 42 NY 2D 63, 396 NYS 2D 817.

AS TO POINTS III AND IV

THE MARRIAGE MAY NOT BE RESURRECTED BY THE ACTIONS OF THE PARTIES AFTER A DIVORCE. THERE MUST BE A REMARRIAGE TO SUBSTANTIATE SUCH AN ARGUMENT.

THERE TOO, IS NO CORROBORATION OF PETITIONER'S CLAIM THAT HE WAS NOT REPRESENTED BY COUNSEL, DID NOT KNOW WHAT HE SIGNED, BECAUSE OF POST DIVORCE ACTIVITIES.

AS TO POINT V

DOCTRINE OF COMITY

THE PETITIONER HEREIN, MAKES A DESTINCTION BETWEEN FULL FAITH AND CREDIT OF A SISTER STATE'S JUDGMENTS AND COMITY WITH RESPECT TO FOREIGN JUDGMENTS.

THE CITATIONS OF CALDWELL V. CALDWELL, 298 NY 146, DOES NOT PROVE HIS POINT. THE COURT STATED THAT NOTHING DETERS THE RECOGNITION OF FOREIGN DECREES AND THAT FULL FAITH

AND CREDIT AND COMITY HAVE NO RELATIONSHIP TO THE OTHER.

THE PETITIONER WAS REPRESENTED BY NEW YORK COUNSEL, WHO OBTAINED MEXICAN COUNSEL TO REPRESENT PETITIONER IN THE THIRD DISTRICT COURT, BRAVOS COUNTY, CHIHUAHUA, MEXICO.

THE PETITIONER DID SIGN A SPECIAL POWER OF ATTORNEY AT HIS ATTORNEY'S HOME, WHICH SIGNATURE WAS ACKNOWLEDGED BY HIS ATTORNEY, A NOTARY.

THAT AN APPEARANCE WAS MADE FOR HIM BY HIS DESIGNEE, A MEXICAN ATTORNEY, ONE CARLOS URANGO MUNOZ.

THAT THE POWER, CONSENT AND WAIVER, WAS ADMITTEDLY SENT TO THIS ATTORNEY IN MEXICO, MR. MUNOZ, BY PETITIONER'S ATTORNEY.

THAT THE RESPONDENT ATTENDED THE HEARING AT THE DISTRICT COURT, DID COMPLY WITH THE RULES AND JURISDICTIONAL REGULATIONS OF SAID STATE OF CHIHUAHUA.

It is axiomatic that a bi-lateral Mexican divorce is recognized in the State of New York.

In Greschler v. Greschler, 51 NY 2d 308, 434 NYS 2d 194, the Court of Appeals stated:

> "(3,4) Although not required to do so, the courts of this State generally will accord recognition to the judgments rendered in a foreign country under the doctrine of comity which is the equivalent of full faith and credit given by the courts to judgments of our sister States. (See e.g., Schoenbrod v. Siegler, 20 N.Y. 2d 403, 408, 283 N.Y.S. 2d 881, 230 N.E. 2d 638; see, generally, Restatement, Conflict of Laws 2d, § 98; Leflar, American Conflicts Law (3d ed.), § 84, pp. 169-171). Absent some

SHOWING OF FRAUD IN THE PROCUREMENT OF THE FOREIGN COUNTRY JUDGMENT (FEINBERG V. FEINBERG, 40 N.Y. 2D 124, 386 N.Y.S. 2D 77, 351 N.E. 2D 725) OR THAT RECOGNITION OF THE JUDGMENT WOULD DO VIOLENCE TO SOME STRONG PUBLIC POLICY OF THIS STATE (SEE, E.G. MERTZ V. MERTZ, 271 N.Y. 466, 3 N.E. 2D 597), A PARTY WHO PROPERLY APPEARED IN THE ACTION IS PRECLUDED FROM ATTACKING THE VALIDITY OF THE FOREIGN COUNTRY JUDGMENT IN A COLLATERAL PROCEEDING BROUGHT IN THE COURTS OF THIS STATE.

IN EXTENDING COMITY TO UPHOLD THE VALIDITY OF FOREIGN COUNTRY DIVORCE DECREES (ROSENSTIEL V. ROSENSTIEL, 16 N.Y. 2D 64, 262 N.Y.S. 2D 86, 209 N.E. 2D 709), IT IS LOGICAL THAT WE WOULD ALSO RECOGNIZE ALL THE PROVISIONS OF

SUCH DECREES, INCLUDING ANY SEPARATION AGREEMENTS WHICH MAY HAVE BEEN INCORPORATED THEREIN. (SEE LAPPERT V. LAPPERT, 20 N.Y. 2D 364, 283 N.Y.S. 2D 26, 229 N.E. 2D 599). IN FACT, WE HAVE STATED THAT A FOREIGN DIVORCE DECREE RENDERED BY A COURT WITH PERSONAM JURISDICTION OVER BOTH SPOUSES HAS AN "OVERRIDING EFFECT" ON ANY SUBSEQUENT ACTION SEEKING ALIMONY SUCH THAT "NO RIGHT OF SUPPORT CAN SURVIVE EXCEPT AS AWARDED BY THE FINAL DECREE OF DIVORCE OR BY AN AUTHORIZED AMENDMENT TO SUCH DECREE." (LYNN V. LYNN, 302 N.Y. 193, 203-204, 97 N.E. 2D 748; LAPPERT V. LAPPERT, 20 N.Y. 2D 364, 367, 283 N.Y.S. 2D 26, 229 N.E. 2D 599, SUPRA.)"

AS TO POINT VI

TENANCY IN COMMON

It is the position of the respondent that there is no longer a tenancy in the entirety. That the bi-lateral Mexican decree terminated the marriage and that the parties are tenants in common. That as such, the court may partition and direct a sale of the premises.

POINT I - IN REPLY

The respondent herein submits that the petitioner did not call a witness, whose testimony was available.

The petitioner did not care so to do.

The attorney, Kenneth L. Shapiro, is listed as an attorney in two telephone books - Manhattan directory, p. 1256, first column - Kenneth L. Shapiro atty 275 Madison Avenue - 582-7700.

The attorney, Kenneth L. Shapiro, is also listed in the Brooklyn telephone book, p. 861 - Kenneth L. Shapiro atty
275 Madison Avenue, Manh.
582-7700.

Thus, the startling statement of the petitioner that Kenneth L. Shapiro, was not known to him as an attorney, and that he signed the consent at Kenneth L. Shapiro's home, not knowing the contents, but at the behest of his attorney, Herbert Berman, Esq., leaves much to be desired with respect to petitioner's credibility.

The incredulity of petitioner's statement is more apparent when one looks at the filed papers, viz., that Kenneth L. Shapiro, Esq., appeared as petitioner's attorney in the Supreme Court Kings action; that his name appeared on the back of said answer; that he signed a stipulation of discontinuance as the

PETITIONER'S ATTORNEY, AND VERIFIED THE PETITIONER'S SPECIAL POWER OF ATTORNEY TO ONE, CARLOS URANGO MUNOZ, A MEXICAN ATTORNEY.

HOWEVER, THE RESPONDENT RECEIVED THE POWER ADMITTEDLY SIGNED BY THE PETITIONER, THE SIGNATURE THEREON VERIFIED BY AN ATTORNEY-AT-LAW, KENNETH L. SHAPIRO, SUPRA, EXPENDED HER FUNDS TO ENPLANE TO MEXICO, HAVING RETAINED AND PAID FOR A MEXICAN ATTORNEY, PAID HOTEL BILLS, STAYED IN MEXICO IN CONFORMITY WITH THE REQUISITE PERIOD PROSCRIBED BY SAID COURT'S STATUTES, RETURNED AND KEPT HER PART OF THE BARGAIN.

THE INSTRUMENTS AND INSTRUMENT ARE IN EVIDENCE.

YET, THE PETITIONER MADE NO ATTEMPT TO CALL OR SUBPOENA HIS FORMER ATTORNEY TO CORROBORATE HIS DEFENSE, OF FRAUD.

It is requested that this court give no weight to this petitioner's testimony and that the respondent's evidence already in the case, be construed strongly in her favor.

It is respectfully submitted, that the legal issue with respect to petitioner's failure to produce a witness or evidence in the possession or control of a party, was set forth in Jarret v. Madifari, 67 AD 2d 396, 415 NYS 2d 644:

> "The rule with respect to the drawing of an unfavorable inference from the failure to call a witness applies only to a person whom the party would naturally be expected to call . . . ."
>
> . . . . As noted in Reehil v. Fraas, 129 App. Div. 563, 565, 114 NYS 17, 18 (2nd Dept. 1908,

REV. ON OTHER GROUNDS, 197 N.Y. 54, 90 N.E. 340 (1909):

> '(THE) RULE IN RESPECT OF A FAILURE OF A PARTY TO PRODUCE ORAL EVIDENCE IS THAT SUCH FAILURE IS A FACT TO BE CONSIDERED IN DETERMINING HOW MUCH WEIGHT, IF ANY, SHOULD BE GIVEN TO THE EVIDENCE WHICH HE HAS PRODUCED . . . THE QUESTION IS ONE OF INFERENCE FOR THE JURY - OR FOR THE TRIAL JUDGE, IF THERE BE NO JURY; I.E. IT IS NOT AN INFERENCE OR PRESUMPTION OF LAW, BUT ONE OF FACT . . .'

HOWEVER, THE PETITIONER DID STIPULATE THAT THE SAID KENNETH L. SHAPIRO IS AN ATTORNEY; THAT THE POWER OF ATTORNEY WAS EXECUTED IN HIS PRESENCE AND THAT HE ACKNOWLEDGED SAME.

CERTAINLY, IF THE PETITIONER WISHED MORE, HE COULD HAVE CALLED HIM.

THE PETITIONER SHOULD HAVE CALLED HIS OWN ATTORNEY. THE ATTORNEY COULD INTERPOSE THE QUASH OF PRIVILEGE IF RESPONDENT CALLED HIM.

POINT II

THE ACTIONS OF THE PARTIES AFTER THE DIVORCE ARE NOT PERSUASIVE BUT ARE SUBJECT TO LOWER COURT'S INTERPRETATION

THE PETITIONER HAS TESTIFIED THAT THE RESPONDENT COHABITED WITH HIM AFTER THE DIVORCE, ATTENDED A 25TH WEDDING ANNIVERSARY AND THAT SHE USED HIS MEDICAL PLAN. THE PETITIONER CONTENDS THAT AS A RESULT OF THESE POST DIVORCE FACTORS, RESPONDENT'S COMPLAINT SHOULD BE DISMISSED.

IN BOXER V. BOXER, 12 MISC. 2D 205, 207, 177 NYS 2D 85; AFFIRMED 7 AD 2D 1001, 184 NYS

2d 303, (2nd Dept.) affirmed 7 NY 2d 781, 194 NYS 2d 47, seemingly is on all fours with the facts in the instant cause.

The wife sued for a declaratory judgment.

Therein, the husband was the recepient of a power of attorney and consent in an Alabama divorce.

He testified he left New York on Friday, attended court Saturday, returned Sunday. Thereafter, he continued to see his ex-wife, admitted having relations with her.

They appeared at weddings and social functions. He acquiesced in their being introduced as husband and wife. In due course, a child was born, which he refused to recognize because he relied on the validity of the divorce.

The court found the wife was not fraudulently induced to appear in the Alabama action. She executed and acknowledged the power of attorney,

FULLY AWARE OF THE CONTENT AND PURPOSE . . .

SHE WAS 28 YEARS OF AGE, A HIGH SCHOOL GRADUATE WITH BUSINESS EXPERIENCE OF SOME FOUR YEARS AS SECRETARY TO A BUYER IN WHICH POSITION SHE HANDLED CORRESPONDENCE AND ORDERS.

THE COURT IS OF THE OPINION THAT SHE WAS SUFFICIENTLY INTELLIGENT TO UNDERSTAND THE NATURE OF THE DOCUMENT WHICH SHE READ AND ACKNOWLEDGED BEFORE A NOTARY . . . .

ON PAGE 88, THE COURT STATED:

> "HAVING THUS VOLUNTARILY EXECUTED A POWER AUTHORIZING AN ATTORNEY IN ALABAMA TO APPEAR FOR HER (HIM) IN A CONTEMPLATED DIVORCE ACTION TO ADMIT ON HER BEHALF THE JURISDICTIONAL ALLEGATIONS OF THE COMPLAINT PLAINTIFF IS ESTOPPED FROM CHALLANGING THE RESULTANT DECREE . . ."

In the instant cause, there is greater weight to respondent's case, in that the petitioner was represented by counsel; that he signed the papers in his attorney's presence; that his attorney took his signature and delivered same to his Mexican attorney.

The petitioner also informed this court that the was a high school graduate and had attended three colleges.

The petitioner testified that he was an executive in the office of the District Attorney - Kings County, investigator Rackets Bureau 1968-1970, and had been an executive in the office of the Comptroller of the City of New York 1970-1975, and that he had been a salesman for years.

The court could take arithmatical and judicial notice that he had been married approximately 21 years (1970-1949) and was in his matured 40's at the time he executed the power.

IT IS RESPECTFULLY SUBMITTED THAT HE HAD SUFFICIENT COMPREHENSION, AND INTELLIGENCE TO UNDERSTAND THE NATURE OF THE DOCUMENT HE SIGNED, ESPECIALLY WITH THE ASSISTANCE OF COUNSEL. (CHRISTIAN V. CHRISTIAN, 42 NY 2D 63, 396 NYS 2D 817).

CONCLUSION

THE APPLICATION HEREIN FOR A WRIT OF CERTORARI SHOULD BE DENIED.

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No. 83-311

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

ABRAHAM STRASSNER,

PETITIONER,

V.

SELMA ROTHSTEIN STRASSNER,

RESPONDENT.

On Petition for Writ of Certiorari to the New York State Appellate Division

REPLY BRIEF FOR PETITIONER

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2316 National Drive
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Telephone: (212) CH1-8713

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CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

> No person shall be deprived of property. . . without due process of law. . . .

Replying to the history portion of respondent's answer:

1. If respondent was the subject of cruel treatment including assaults and batteries, what then, persuaded her to return and live with the petitioner after the alleged Mexican divorce.

2. Respondent repeats that petitioner's attorney was Kenneth L. Shapiro; this repetition is essential to respondent's position because it was in front of this attorney that petitioner's signature on the alleged consent to the Mexican divorce action was procured. Respondent seeks to prove this allegation by the admission in evidence of a court file which contains this attorney's name typed in above the name of a law firm of which he was never a member. Petitioner submits herewith a copy of his attorney's card and has previously testified under oath that his attorney was not Kenneth L. Shapiro, but George Meissner. The burden

of proof in the court below was on the respondent herein, yet, the respondent failed to call Kenneth Shapiro as a witness although respondent's attorney asked for an adjournment for the express purpose of calling such witness; to which petitioner's attorney consented.

3. Respondent's recitation of the facts concerning the meeting between the parties in July, 1970 is at variance with that of the petitioner. The rational way for a court to judge which version is correct, is to look at the actions of the parties which followed the meeting.

Petitioner contends that the fact that the parties lived together as husband and wife for almost eight (8) years after the alleged divorce, that respondent signed tax returns, procured insurance benefits, signed mortgages in two states under oath, and voted, all as the wife of the

petitioner, indicates that the respondent perpetrated upon the petitioner herein a fraud in obtaining a Mexican divorce, which fraud she sought to cover by the passage of time.

4. Petitioner further contends that at the time he signed the document in question he was without reading glasses and in fact did not see the nature of the document signed.

5. Respondent relies upon the fact that petitioner worked as a investigator for the District Attorney's office of Kings County, and for the Comptroller of the City of New York; and is a high school graduate. This is shown by the respondent in an attempt to prove that petitioner must have known what he was signing.

People in the midst of an emotional crisis caused by the flight of a long time mate are under such emotional stress as to

be able to sign documents without understanding their full meaning and import. When petitioner ws asked at the trial why he signed the document in question (consent to appear in Mexican court) he stated, "Because I wanted my wife." Given the circumstances of the July, 1970 meeting between the parties, and the petitioner's version of what took place thereat, the signing of a document which would bring his wife back to him as his wife, is not incredible or incredulous, as the court below found.

6. Respondent avers that petitioner lives rent free at the home, when in fact, the mortgage costs and other expenses far exceed the rental income received by the petitioner.

CONCLUSION

WHEREFORE, petitioner respectfully requests that the petition be granted.

Dated: New York, New York
October 26, 1983

ABRAHAM STRASSNER

ULSTER 2-3200
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SPECTOR, MEISSNER, GREENSPUN,
BERMAN & FINK
ATTORNEYS AT LAW

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16 COURT STREET
BROOKLYN, N. Y. 11201

POINT I

JUDGMENTS OF FOREIGN NATIONS ARE MERELY ENTITLED TO COMITY AND NOT FULL FAITH AND CREDIT

The Court of Appeals has stated:

> We are commanded by the Constitution to five full faith and credit to the judgment of a sister state - a command which has no relation, of course, to foreign nation divorce decrees. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948)

This principle has been re-stated more recently in Santamaria v. Santamaria, 74 Misc.2d 657, 345 N.Y.S.2d 906 (Nassau, 1973), wherein the court noted:

> °T]here is a significant difference in the view of New York courts toward alien decrees and decrees of sister states. Whereas another state's divorce judgment entitlement to full faith and credit in New York is a profound principle upon which the federal system in this country rests, the court orders of foreign nations are respected only in so far as comity requires (numerous citations). Where a foreign country is but a brief haven for New York couples seeking divorce, and the family

> resides in New York, there are important reasons for tipping comity considerations in favor of New York's power to enforce, supervise and modify the decree. 345 N.Y.S.2d at 910-911.

The court below, after a short hearing but after the solicitation of memoranda of law saw fit to render a decision granting full faith and credit to a Mexican divorce decree. This was done after the court withheld its decision for six months. It is abundantly clear that the court erred grievously in its decision in this matter as well as in its fact finding.

This Court should use its power over decrees which, on their face, are entitled merely to comity, to totally annul the decree and declare it obtained in fraud, as the facts herein demand.

Appellant is aware that even a decree of a sister state which would be entitled to full faith and credit, may be attacked collaterally for fraud, and certainly a

Mexican decree procured under the circumstances related herein and entitled, at best, to comity, may be attacked and overturned by the fraud demonstrated herein, as well as the lack of voluntariness of the consent alleged to have been obtained herein. See in this regard, Anello v. Anello, 22 A.D.2d 694, 253 N.Y.S.2d 759 (2nd Dept., 1964); Andrews v. Andrews, 188 U.S. 14, 23 S.Ct. 237, 47 L.Ed. 366; Hunt v. Hunt, 72 N.Y. 217 and Prime v. Hinton, supra.

POINT II

REAL PROPERTY HELD BY PARTIES AS TENANTS BY THE ENTIRETY IS NOT SUBJECT TO PARTITION

The Real Property Actions and Proceedings Law, Section 901 sets forth when an action for partition shall lie. Such statute does not grant the right of partition to property held as tenants by the entirety.

Since the alleged divorce in the instant case was obtained in a non-voluntary and fraudulent manner, no severance of the marital ties sufficient to permit the real property to be partitioned has occurred. See in this regard, Prime v. Hinton, supra, and Anello v. Anello, supra.